IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

MARQUIS DYER,

Plaintiff-Appellee.

SC # 123590

vs.

COA Docket No. 235114
Lower Court No. 00-024036-NH

EDWARD P. TRACHTMAN, D.O.,

Defendant-Appellant,

DEFENDANT-APPELLANT'S
BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED

I. IN MICHIGAN DOES AN INDEPENDENT MEDICAL EXAMINATER OWE A DUTY ON WHICH THE RECIPIENT CAN FILE A CIVIL LAWSUIT ABSENT A PHYSICIAN/PATIENT RELATIONSHIP.

Trial Court answered:	"Yes"
Defendant-Appellant answered:	"Yes"
Plaintiff-Appellee answered:	"No"
Michigan Court of Appeals answered:	"No"

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over said matter pursuant to the Court's Order of July 3, 2003 granting Defendant-Appellant's Application for Leave to Appeal, filed pursuant to MCR 7.302.

STANDARD OF REVIEW

This Appellate Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition. **Groncki v Detroit Edison, 453 Mich 644, 649; 557 NW2d 289 (1996).**

STATEMENT OF FACTS AND PROCEEDINGS

In June 1995, Plaintiff was involved with an altercation with the Detroit Police Department wherein his left knee and right shoulder were injured. Subsequently, Plaintiff filed a lawsuit in relation to said incident.

During the course of that lawsuit Plaintiff was sent for an independent medical examination (hereinafter "IME") by the attorneys for the City of Detroit to Physician's Evaluation Group. Specifically, Plaintiff was seen on or about May 15, 1997 by Edward P. Trachtman, D.O. for said IME.

During the IME performed by Dr. Trachtman, Plaintiff claims his right arm was forced into the air without Plaintiff's prior consent or knowledge that his arm would be examined, a claim which Dr. Trachtman emphatically denies.

Plaintiff-Appellee thereafter filed his original Complaint together with an Affidavit of Merit on May 13, 1999. **See attached as Appendix 2a through 10a.** Said Complaint contained an unnumbered count stating that Dr. Trachtman had "violated the aforesaid standard of care" (citing Plaintiff-Appellee's original Complaint, paragraph 17), as well as counts alleging battery, third party beneficiary, and negligent retention in hiring.

On December 21, 2000, Defendant-Appellant filed his Motion for Summary Disposition, arguing that, as no physician/patient

relationship existed between Plaintiff-Appellee and Defendant-Appellant, the professional negligence allegations must be dismissed. **See attached as Appendix 11a through 21a.** Further, Defendant-Appellant's motion argued that the remainder of the allegations contained in Plaintiff's Complaint were mere restatements of the original malpractice claim and must, therefore, be dismissed.

Plaintiff subsequently filed a Motion to Amend Complaint on or about January 4, 2001. **See attached as Appendix 38a through 49a** Plaintiff's proposed First Amended Complaint alleged counts of professional negligence, battery, third party beneficiary, negligent hiring and retention, negligence, gross negligence, and intentional infliction of emotional distress. Defendant-Appellant filed a written response in opposition to Plaintiff's Motion for Leave to File Amended Complaint on January 12, 2001, which discussed the futility of Plaintiff's proposed Amended Complaint, as all allegations arose out of the discharge of Defendant-Appellant's professional duties. **See attached as Appendix 50a through 54a**

Plaintiff-Appellee's Motion for Leave to Amend was heard before the trial court on February 7, 2001; however, the matter was taken under advisement pending Defendant-Appellant's Motion for Summary Disposition. Said Motion for Summary Disposition was heard on May 3, 2001. **See attached as Appendix 55a through**

70a. After oral argument, the trial court issued its ruling granting Defendant's Motion for Summary Disposition as well as denying Plaintiff's Motion for Leave to Amend on the basis that the requested relief was futile. **See attached as Appendix 71a through 72a**

Thereafter Plaintiff-Appellee appealed the trial court's decision granting Defendant's Motion for Summary Disposition to the Michigan Court of Appeals. **See attached as Appendix 75a through 101a** Though the parties were originally notified that oral argument had been denied, a second notice was received from the Court of Appeals indicating oral argument would be conducted on February 18, 2003 at Wayne State University Law School.

On March 13, 2003 the Court of Appeals issued a published opinion setting forth a specific duty owed by all examining physicians, even where no physician/patient relationship exists. **See attached as Appendix 124a through 126a.** The Court of Appeals held Plaintiff could not maintain a professional negligence claim against Defendant, but remanded the case to the trial court after allowing Plaintiff to file an Amended Complaint based on ordinary negligence.

Defendant-Appellant timely filed an Application for Leave to Appeal on or about April 3, 2003. Same was granted by order of the court dated July 3, 2003, **see attached as Appendix 127a**

and the subject Brief is being timely filed thereafter in compliance with **MCR 7.309(B)(1)(a).**

ARGUMENT

I. BASED ON MICHIGAN'S LONG RECOGNIZED PRINCIPLES OF MEDICAL MALPRACTICE, AN INDEPENDENT MEDICAL EXAMINER SHOULD NOT OWE A DUTY TO AN EXAMINATION RECIPIENT ON WHICH A CIVIL LAWSUIT COULD BE BASED ABSENT A PHYSICIAN/PATIENT RELATIONSHIP.

A. THE MICHIGAN SUPREME COURT SHOULD ADOPT THE PRINCIPLES RECENTLY SET FORTH IN WYOMING IN HOLDING THAT A PHYSICIAN PERFORMING AN INDEPENDENT MEDICAL EXAMINATIONS DOES NOT OWE A PROFESSIONAL DUTY TO A RECEIPIENT ON WHICH A CIVIL LAWSUIT CAN BE BASED.

It is well established that an individual alleging negligence in this state must establish a duty existed on the part of the defendant, a breach of that duty, causation and damages. **Case v Consumers Power Co., 463 Mich 1, 6; 615 NW2d 17 (2000)**. The courts of this state have also long required that a physician-patient relationship exist before a medical professional will be found to owe a duty to a plaintiff. **Cox v Board of Hosp. Managers for City of Flint, 467 Mich 1, 44; 651 NW2d 356 (2002)**, and **Theisen v Knake, 236 Mich App 249, 257; 599 NW2d 777 (1999)**. The Michigan Court of Appeals' opinion in the lower proceeding was an attempt to abolish the centuries-old law in the state of Michigan concerning professional liability, malpractice and basic negligence.

A panel of this state's court of appeals created new, unfounded law by holding that an IME physician owes a duty

during an independent medical examination even absent a physician/patient relationship. Not only is this position inconsistent with prior longstanding Michigan law (including the requirement of a duty and the basis for said duty in the medical context existing solely in the presence of a physician-patient relationship), but the Court of Appeals failed to recognize the negative impact of this decision and failed to insure that it is properly limited in scope.

On June 27, 2003 the Supreme Court of Wyoming was asked to decide whether or not an IME physician owed a duty to an examinee absent the physician/patient relationship. In **Erpelding v Lisek, 71 P. 3rd 754 (Wyo.2003) (see attached)** the Wyoming Supreme Court noted, as in Michigan, a physician/patient relationship is required to establish a duty owed by a health professional. **Id at pp. 757-758, citing Roybal v Bell, 778 P. 2d 108, 109 (Wyo. 1989)** and **Vassos v Roussalis, 658 P. 2d 1284, 1287 (Wyo. 1983).** The court did, citing **Duncan v Afton, Inc., 991 P. 2d 739, 741 (Wyo. 1999)**, discuss Wyoming's eight part balancing test used to determine whether or not a defendant owed a duty of care to a plaintiff: (1) foreseeability of harm to the Plaintiff; (2) the closeness of the connection between the Defendant's conduct on the injury suffered; (3) the degree of certainty that the Plaintiff suffered harm; (4) the moral blame

attached to the Defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden upon the Defendant; (7) the consequences to the community and the court system; and (8) the availability, cost and prevalence of insurance for the risk involved.

In beginning its analysis, the court noted it would assume Defendant was negligent in his conduct. **Erpelding, supra., at p. 758.** The court quickly noted that the forseeability of harm to a plaintiff in the subject context would almost always shift in favor of a plaintiff as he or she would have at least economic damages based on the independent examiner's opinion as a basis for a negligence action. The following three factors were only briefly addressed and did not sway the court that a duty of care should be employed.

However in analyzing the sixth factor, the extent of the burden on the Defendant, the court noted,

> "there would undoubtedly be a serious impact on the objectivity of an independent examiner and on his willingness to even undertake the responsibility of making a recommendation if the examination must be made with one eye studying the prospect of being sued by the examinee." **Id., at p. 59.**

The court also quoted **Martinez v Lewis, 969 P.2d 213 (Colo. 1998),**

> "if an IME practitioner's evaluations could lead not only to vehement disagreement with and vigorous cross-examination of the practitioner in the claims or litigation process, but also to his or her

> potential liability for negligence, the resulting chilling effect would be severe." **Erpelding, supra., at pp. 759-60, quoting Martinez, supra. at p. 219, quoting Hafner v Beck, 185 ARIZ 389, 916 P. 2d 1005, 1107 (1995).**

Similarly, the court was concerned with the potential flood of litigation, and highlighted the New York case of **Davis v Tirrell, 443 N.Y.F. 2d 136, 110 Misc.2d 889 (1981),** wherein that court had noted that permitting the filing of lawsuits against independent medical examiners would likely make it impossible to find any expert witnesses who would risk a lawsuit in order to provide opinions and conclusions in litigation. The **Erpelding** court also noted that imposing such a duty would also permit "an endless stream" of lawsuits wherein persons who received a negative independent medical examination results could seek to redeem their loss by suing the examiners. **Erpelding, supra., at p. 760, citing Davis, supra, at p. 140.**

The **Erpelding** court concluded by reiterating that "duty is an expression of the sum total of those considerations of policy which lead the law to say the Plaintiff is entitled to protection". **Erpelding, supra., at. p. 760, citing Duncan, supra., at p. 746.** The court thereafter held that Defendant did not owe the Plaintiff a duty of care, and noted that their conclusion was "in accord with virtually every other court that has considered this issue". **Erpelding, supra., at p. 760,**

citing Felton v Schaeffer, 229 Cal. App. 3d 229, 279 Cal. Rptr. 713, 716 (1991).[1]

As discussed in **Erpelding, supra.**, New York courts have likewise refused to create a duty of due care for independent medical examiners. In **Davis v Tirrell, 443 N.Y.S. 2d 136, 110 Misc2d 889 (1981) (see attached)** a medical malpractice action was brought against a psychiatrist who had been retained by a school district to perform an examination of a minor child. The court began by noting that New York courts had previously held that a physician/patient relationship was a perquisite for an action sounded in malpractice. **Id at p. 892, citing Mrachek v Sunshine Bisquit, 308 N.Y. 116, 123 N.E.2d 801** and **Chiasera v Employers Insurance Co., 101 MISC. 2d 877, 422 N.Y.S. 2d 341.**

Reiterating that a claim for medical malpractice centers on the duties owed to a patient, and that expert evidence is required to establish said duties, the **Davis** court held that the duty of an IME physician was not a question of ordinary negligence. **See Davis, supra., at pp. 139-40.** Ultimately, the court held that the action must be dismissed as it was based on

[1] Similarly, in other jurisdictions, the absence of a physician-patient relationship has resulted in a determination that there is no duty of due care owed by the doctor to the examinee. **See Hafner v Beck, 185 Ariz. 389, 916 P.2d 1105 (Ct. App. 1995)** (since no physician-patient relationship existed, duty ran not from the independent medical examiner to the examinee, but from the independent medical examiner to the insurance carrier); **Violandi v City of New York, 184 A.D.2d 364, 584 NYS2d 842 (NY. App. Div 1992)** (a physician-patient relationship does not exist when the examination is conducted solely for the purpose or convenience or on behalf of an employer); see also **Peace v. Weisman, 186 Ga. App. 697; 368 SE 2d 319 (1988).**

medical malpractice and there was no physician/patient relationship.[2]

Before embarking on new law, the Court of Appeals should have employed a balancing test similar to that set forth in **Erpelding, supra.** In review of the eight factor test set forth above, it is clear that the duty created by the Michigan Court of Appeals in the lower proceeding would have a catastrophic chilling affect on the availability of physicians willing to act as independent medical examiners. As discussed by the **Erpelding** court, anyone negatively impacted by the results of an independent medical examination could allege an injury, whether it be a physical injury as set forth in **Chiasera, supra**., or an economic injury as set forth in **Erpelding, supra**.

However, the motivation for performing independent medical examinations, in the light of the newly formed duty, is significantly hampered.[3] Under this new law, independent medical examination physicians must now consider the potential for civil liability. As such, it is not difficult to imagine a day when physicians refuse to perform independent medical examinations all together.

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[2] The court also noted that the statements on which Plaintiffs were basing their complaint were likely covered by privilege and, therefore, not actionable. However, this determination came after the court held that the action must be dismissed based on the absence of a physician/patient relationship and after having determined that the action sounded in medical malpractice. **See Davis at pp. 895- 893.**

[3] Appellant's counsel has been contacted on several occasions by representatives of professional periodicals/journals for comments on this case, including Medical Economics Magazine who has already realized the potential impact this may have on the medical community.

In part to avoid a potential healthcare shortage, our legislature previously adopted tort reform in an effort to balance a plaintiff's rights with needed protections of medical providers in Michigan. In discussing the constitutionality of the tort reform statutes, the Michigan Court of Appeals in **Zdrojewski v Murphy, 254 Mich App 50, 657 NW2d 721 (2002)** discussed the legislative intent behind same.

> "The 1993 legislation that created the current finite limitation scheme was prompted by the Legislature's concern over the effect of medical liability on the availability and affordability of health care in the state. See House Legislative Analysis, SB 270 and HB 4033, 4403, and 4404, April 20, 1993, pp. 1-2. The purpose of the damages limitation was to control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs. *Id.*". **Zdrojewski, at pp.80-81.**

While the constitutionality of the tort reform statutes is not currently before this court, the above citation is nevertheless important as a reminder of the recent steps Michigan's Legislature took in an attempt to balance patient rights with the availability of health care. The expansion of Michigan law to create a duty of care for physicians absent a physician patient relationship is contrary to the very purpose of the current Michigan medical malpractice statutes.

B. ALLEGATIONS WAGED AGAINST A PHYSICIAN STEMMING FROM THE PERFORMANCE OF THE PHYSICIAN'S PROFESSIONAL DUTIES ARE GROUNDED IN MALPRACTICE.

The subject action involves an allegation Dr. Trachtman did not properly discharge his professional duties. In **Sexton v. Petz, 170 Mich App 561; 428 NW2d 715 (1988),** Plaintiff was examined by Defendant at the request of Plaintiff's employer after Plaintiff sought workers' compensation benefits. The trial court granted partial summary disposition in favor of the Defendant on the medical malpractice and intentional infliction of emotional distress claims, but allowed Plaintiff to proceed with his negligence and gross negligence claims.

The Michigan Court of Appeals reversed, holding that Plaintiff's Complaint essentially claims that Defendant failed to carefully examine Plaintiff. Finding Plaintiff's Complaint alleged no more than that Defendant failed to properly discharge his professional duties, the separate counts of negligence and gross negligence appear to be nothing more than a restatement of Plaintiff's malpractice claim. As such, the court held that as Plaintiff's malpractice claim was properly dismissed due to the lack of a patient-physician relationship, the claims asserting negligence and gross negligence should likewise have been reversed. **See Sexton v. Petz, 170 Mich App 561; 428 NW2d 715 (1988).**

Plaintiff-Appellee's allegations amount to a claim that Defendant-Appellant failed to properly discharge his

professional duty. Plaintiff-Appellee has alleged that Defendant-Appellant violated the standard of care. As such, Plaintiff-Appellee's allegations clearly sound in medical malpractice and not ordinary negligence.

This Supreme Court previously determined that a claim is to be held to the standards and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim when the facts raise issues that are outside the common knowledge and experience of the jury or, alternatively, raise question of medical management. **Dorris v Detroit Osetopathic Hospital, 460 Mich 26, 594 NW2d 455 (1999)**. Conversely, cases such as **Fogel v Sinai Hospital of Detroit, 2 Mich App 99, 138 NW2d 503 (1965)** and **Gold v Sinai Hospital of Detroit, Inc., 5 Mich App 368, 146 NW2d 723 (1966)** (both of which involved slips and falls while inside of a hospital) proceeded as claims of ordinary negligence as they presented issues which were within the common knowledge and experience of a jury.

Defendant-Appellant does not suggest that a physician could not be found liable for ordinary negligence. In fact, courts in Michigan have routinely held that Plaintiffs can bring a claim based on ordinary negligence if same is not an allegation that the physician failed to properly discharge his or her professional duties. **See Fogel** and **Gold, supra.** However, and as discussed in **Erpelding** and **Davis, supra.**, an action alleging

an injury occurred as part of an independent medical examination alleges violations of professional duties. Such allegations involve questions of medical management **(See Dorris, supra.)** that require expert testimony and are which, therefore, based in professional negligence.

C. AN ACTION ALLEGING NEGLIGENCE IN THE CONTEXT OF AN IME WOULD INVOLVE ISSUES AND CONCEPTS OUTSIDE OF THE KNOWLEDGE OF A LAY PERSON AND WOULD, THEREFORE, REQUIRE EXPERT TESTIMONY.

As set forth above, Michigan law supports the finding that a claim arising out of an IME sounds in malpractice. **Sexton v Petz, 170 Mich App 561; 428 NW2d 715 (1988).** Further, the question of whether or not a physician properly discharged his or her professional duties during a medical examination are questions that are outside of the scope and knowledge of the average lay person. **Dorris v Detroit Osteopathic Hospital, 460 Mich 26, 594 NW2d 455 (1999).**

In the subject action, Plaintiff-Appellee alleges that Dr. Trachtman rotated his arm in a manner that was contra indicative of an individual who had recently undergone rotator cuff repair surgery. The matter would require expert testimony in order to establish the amount of force and rotation an individual who recently underwent rotator cuff repair surgery can undertake, and the standard of care for evaluating individuals who have recently undergone this surgery. These are issues that are not

readily known by the average juror and would, therefore, require expert testimony to clarify.

In the State of Michigan, an action which is filed against a medical professional sounding in ordinary negligence cannot be supported by expert testimony. Specifically, in **Bishop v St. John Hospital, 140 Mich App 720, 364 NW2d 290 (1984),** the Plaintiff sought to allege ordinary negligence and not professional negligence during the middle of the trial proceeding.

In finding that this was improper, the appellate court noted that had the case been originally brought as an ordinary negligence claim the Defendant could have prevented the admission of Plaintiff's expert, as a claim of ordinary negligence could not be supported at the time of trial by an expert witness. **See Bishop, supra. at p. 724 through 725.** The court noted that under a theory of ordinary negligence, the jury is competent to decide what a reasonable person would do under the circumstances, and, therefore, the testimony of Plaintiff's expert witness would have been inadmissible. **Bishop, supra. at pp. 724-725.** As expert testimony is required in order to establish the proper standard and procedures to have been followed in the subject action, and as expert testimony is not permissible in a case of ordinary negligence in the medical

context in the State of Michigan, the subject action clearly sounds in professional negligence.

CONCLUSION

Unlike an action wherein a plaintiff alleges to have slipped and fallen or who alleges to have been struck during a medical examination, in the subject action Plaintiff-Appellee alleges that during an independent examination of his shoulder the examiner, with whom Plaintiff had no physician-patient relationship, injured him. A panel of the Michigan Court of Appeals held that even absent a physician-patient relationship, an examiner owes a duty to an examinee.

This decision would stand to eradicate the principles of negligence in this state (which require the finding of a duty, which in the medical context requires a physician-patient relationship), deter the availability of qualified persons willing to perform independent medical examinations, and has the potential of overburdening the judiciary as well as the insurance industry[4]. As the panel of this State's appellate court did not balance any potential benefit with the insurmountable burdens of this new law, it must be overturned.

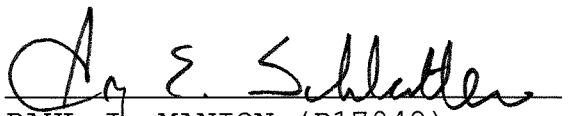
[4] Once again, with increased insurance industry claims and premiums always comes the risk of rising healthcare costs.

RELIEF REQUESTED

Defendant-Appellant Edward P. Trachtman, D.O. respectfully requests that this court reverse the opinion of the Court of Appeals and affirm the opinion of the trial court.

Respectfully submitted,

RUTLEDGE, MANION, RABAUT, TERRY & THOMAS, P.C.



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